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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 308

FLOYD DINAN, FRANK POPLEES, also known as FRANK DAY, true name FRANCIS W. DAY, and ALBERT BRICKER,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

This is the respondent's brief in opposition to a petition by Floyd Dinan, Frank Poplees, also known as Frank Day, true name Francis W. Day (hereinafter referred to as Day), and Albert Bricker, the petitioners, that a writ of certiorari issue to review a judgment of the Court of Appeals of the State of New York (Appendix A, *infra*), which affirmed, by a vote of four to three, a judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which affirmed judgments of the County Court of the County of West-

chester, State of New York, convicting all three petitioners of conspiracy to violate Sections 986 and 987, New York Penal Law, prohibiting bookmaking and policy, and convicting Dinan and Bricker in addition of substantive violations of bookmaking.

The judgments were stayed on July 2, 1962, by Mr. Justice Harlan and bail continued pending the determination of this petition.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on May 17, 1962. On June 12, 1962, upon an application by the petitioners the remittitur was amended by the Court of Appeals to indicate that questions under the Constitution of the United States were presented to and decided by it. The remittitur is printed as Appendix A to the petition (p. 24).

The jurisdiction of this Court is predicated upon the provisions of the United States Code, Title 28, Section 1257 (3).

Questions Presented

1. Whether or not a conviction obtained in a New York State Court based upon the admission of wiretap evidence obtained under a court order pursuant to the Code of Criminal Procedure of the State of New York, Section 813a, violates the petitioners' rights under the Fourteenth Amendment to the United States Constitution.

2. Whether or not there is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution in refusing to permit defense counsel who had been representing the defendants for almost four years to withdraw in the midst of the criminal trial and have other counsel substituted for him.

Statutes and Constitutional Provisions Involved

U. S. C., T47, Sec. 605, Federal Communications Act

U. S. C., T47, Sec. 501, Federal Communications Act

N. Y. Code of Criminal Procedure, Secs. 8, 813a

N. Y. Constitution, Art. I, Secs. 6, 12

U. S. Constitution, Amendments IV, VI, and XIV

These statutory and constitutional provisions are printed either wholly or in appropriate part at pages 3-7 of the petition.

Opinions Below

The prevailing and dissenting opinions of the Court of Appeals of the State of New York are reported at 11 N. Y. 2d 350 and are printed in the petition at page 26; the opinion of the Appellate Division of the Supreme Court of the State of New York is reported at 15 A. D. 2d 786 and is printed in the petition at page 32.

Statement of the Case

All three petitioners were convicted on June 20, 1960 of conspiring from October 1955 to December 8, 1955 to violate Secs. 986 and 987, New York Penal Law, prohibiting bookmaking and policy, a misdemeanor (New York Penal Law, Sec. 580). Dinan and Bricker were also convicted on indictments charging substantive violations of bookmaking, all misdemeanors. They were sentenced as follows: Dinan, four months imprisonment, and fines totaling $4,000; Day, six months imprisonment, and a fine of $500; Bricker, six months imprisonment, the execution of which was suspended, and fines totaling $1,000.

Pursuant to Section 813-a of the New York Code of Criminal Procedure, court orders were signed which authorized the tapping by the Westchester County Sheriff's Office of telephones at ten different locations in the City of Yonkers. Thereafter Deputy Sheriffs tapped such telephone lines for approximately two months in the latter part of 1955, listened to the conversations taking place over such lines, and recorded the conversations on reels of tape. These Deputy Sheriffs testified concerning such wiretapping at the trial herein, and identified the reels of tape, which were placed in evidence over objection, and hundreds of conversations thereon were then played on a playback machine, and testimony was adduced to identify the voices of the participants in such conversations. These recordings disclosed that the participants in the conversations during the time the telephones were tapped were engaged in taking bets on sporting events. The voices of Dinan and Bricker (among others) were each identified by respondent's witness in about fifty of such conversations, and the voice of Day was identified in four conversations. As a result of what they heard over the wiretaps the Deputy Sheriffs conducted simultaneous raids on the various premises involved, secured corroborating documentary evidence, and apprehended a number of persons.

It is undisputed that the wiretaps constituted the basic evidence in the case, and without them the convictions could not have been obtained. Their admission in evidence was objected to at the trial as being in violation of the petitioners' constitutional rights under the Supremacy Clause and the Fourteenth Amendment (R. 453 455, 462, 477, 1128, 1130), and this was also argued and briefed in the Appellate Division and the Court of Appeals.

The indictments against petitioners were consolidated for trial. The trial commenced on February 4, 1960 and continued for eight weeks until March 31, 1960 when the jury's verdict was returned. A Mr. Cribari appeared as attorney for the three petitioners (as well as for two other

defendants as to whom the jury disagreed). He had represented them for some four years prior to the trial. February 4 and February 5 were devoted to selecting the jury. February 6 and 7 were Saturday and Sunday, and the trial was in recess. The District Attorney's opening statement was made on February 8th. Petitioners contend that there was some indication in that opening statement that the evidence against Day would differ in character from that against Dinan and Bricker. The only reference to Day therein is at page 191 of the record, and it is submitted that no such indication exists.

Thereafter three witnesses were heard and Mr. Cribari made certain very broad stipulations concerning their testimony (241-243, 257, 270). Then on the morning of February 10th Mr. Cribari informed the Court that he had procured a stenographic transcript of the prosecutor's opening statement in order to study it, and that the prosecutor had permitted him to examine certain typewritten transcriptions of the wiretaps to be offered in evidence, as a result of which he had come to the conclusion that "There may very well be a conflict of interest between several of the defendants whom I represent" (R. 274-5).

He stated that he had advised his clients that it was to their interest that certain of them be represented by other counsel, and that petitioners Dinan and Bricker (and another person he was representing named Castellucci) "desire to have separate counsel and that they have employed Mr. Joseph Delaney of the New York Bar who is in the courtroom to act in their behalf". The Court was requested to examine the jury as to whether any of them were acquainted with Mr. Delaney, and after such a *voir dire*, to permit Mr. Delaney to be seated at the counsel table and to represent Dinan and Bricker (and Castellucci) from that point on (R. 275). Mr. Cribari said that the reason for his concern was that he had to determine whether one or more of the defendants ought to take the stand to testify in his own defense, and that if he did so

he might have to testify to something that might injure one of the other defendants (R. 277).

At the afternoon session Mr. Cribari requested that Mr. Delaney be permitted to sit with him at the counsel table and assist him. The court, after ascertaining from the jurors that none of them knew Mr. Delaney, granted this last application, stipulating however that Mr. Delaney would "not be permitted to participate in the trial on behalf of any of the defendants" (R. 287).

At the conclusion of the testimony counsel moved for a mistrial because of the denial of the application for the substitution of Mr. Delaney (R. 2183); and after the verdict written motions to set it aside were filed on behalf of Dinan and Bricker (R. 2468, 2471), on the ground that the refusal to allow them to be represented by counsel of their own choosing under the circumstances deprived them of a fair trial, and on behalf of Day (R. 2466), on the ground that the refusal to allow his counsel to withdraw as counsel for three other defendants, when he is supposed first to have discovered a possible conflict of interest, deprived Day of a fair trial.

In the course of this trial it was established that the Day-Dinan syndicate accepted bets on horseraces (R. 2001), sporting events of various kinds (R. 1657) and policy (R. 2091), through their various personnel not only in the city of Yonkers but throughout the major portion of Westchester County. That this was a far flung organization cannot be speculated upon. No fewer than five sheetwriters were shown to have been taking bets (R. 348, 846, 864, 884, 889-891); and according to expert testimony (R. 2000) each such sheetwriter accepts bets for the syndicate from at least two dozen or more half sheet men or agents, each of whom, as the local contact with the bettor, serves countless numbers of bettors.

The trial testimony indicated that on the day of the raid in question there had already been accepted by the

syndicate in excess of $4,700 in bets which represented only a part of the day's play. The annual volume of illegal betting ran into millions of dollars annually. The evidence clearly established that this was no small operation, but a syndicated gambling ring of major proportions which was even negotiating to expand the scope of its operation into the metropolitan area of New York City (R. 1422-1426).

This Writ Should Not Be Granted

Question 1

(Replying to the questions enumerated by the petitioners as #1, 2, 3, 4, and 5.)

The petitioners contend that *Mapp* v. *Ohio*, 367 U. S. 643, mandates the finding that wiretap evidence is illegally procured evidence and hence is inadmissible even in state courts. They base this contention on the devious and circumlocutory route of elevating the Federal Communications Act, § 605, to equal dignity with the Bill of Rights of the Constitution of the United States. It seems unnecessary to point out that no statute can aspire to such a status. One need look no further than Article V of the United States Constitution and see the calculated difficulty which attends amending the Constitution to realize that a constitutional prohibition far outweighs a statutory prohibition. Nevertheless, the petitioners seek to equate the two because only by such equation can they hope to be successful.

We respectfully call the attention of the Court to its holding in *Mapp* v. *Ohio*, *supra*, to point out that its language leads to the logical conclusion reached by the New York Court of Appeals, i.e., that the *Mapp* case was solely concerned with invasions of a *constitutionally* given right. This seems to be the point of what is suggested to be the

operative portion, indeed the essence of the *Mapp* decision, 6 L. ed. 1081, 1090:

> "We hold that all evidence obtained by searches and seizures *in violation of the Constitution* is, by that same authority, inadmissible in a state court." (Emphasis supplied)

This suggestion is lent support not only by the Court's recurring references to constitutional questions, but by the selection of cases cited therein and perhaps most of all by the Court's expressed intention of overruling *Wolf* v. *Colorado*, 338 U. S. 25, dealing with a purely constitutional matter.

If the question presently before this Court were a constitutional one, *Mapp* could not be less than controlling. It is the respondent's thesis, however, that this is not a constitutional question. The petitioners claim that it is so on the theory that any conflict between a state statute and a federal statute must be resolved by the dominance of the federal statute as prescribed by the United States Constitution, Article VI, Clause 2, i.e., the Supremacy Clause. That this is a particularly pernicious theory with potential results of the most far reaching magnitude is acknowledged even by the petitioners. They go on to say, Petition, page 12: "This is not the same as to say that every time a Federal statute is violated, the Constitution is violated." But that is precisely what they are saying because by invoking the Supremacy Clause against a state statute the petitioners are saying the state law is unconstitutional not because it is violative of the Constitution, but because of the mere happenstance of the existence of a conflicting federal statute. Thus potentially *every* federal statute has the capacity to be vested with the dignity of the United States Constitution. To view the same question from a different angle, each of the fifty state legislatures has the power to raise any federal statute to the level of a constitutional mandate, if the petitioners are

correct, simply by passing a state law which happens to be at variance with the federal law. This is so despite the clear abjuration by the framers of the Constitution of the casual amendment of that document, U. S. Constitution, Art. V.

The petitioners argue that the result, considered totally, of *Schwartz* v. *Texas*, 344 U. S. 199; *Benanti* v. *United States*, 355 U. S. 96; *Wolf* v. *Colorado*, 338 U. S. 25; *Stefanelli* v. *Minard*, 342 U. S. 117; and *Mapp* v. *Ohio*, 367 U. S. 643, compel the finding now that the instant case ought to be reversed. It is submitted that these cases must be considered in a more orderly fashion than that suggested merely by the accident of their having common facets. For that reason we here treat them chronologically in the belief that only in such treatment can their composite rationale be appreciated. To the cases which the petitioners cite we would also add *Olmstead* v. *United States*, 277 U. S. 438, the precursor to the whole array as they bear on the instant case, and *Weeks* v. *United States*, 232 U. S. 383, which gave life to them all.

Essentially, the *Weeks* case first established the principle that unconstitutionally seized evidence, viz.: evidence obtained through unconstitutional search and seizure, was inadmissible. The restriction was there limited to federal agents alone. Next came *Olmstead* v. *United States*, *supra*. In that case this Court was asked to hold that intercepted telephone communications fell within the *Weeks* proscription. It declined to do so, because, "There was no searching. There was no seizure." *Olmstead* v. *United States*, *supra*, page 464. This Court refused to characterize wiretapping as violating the protection against unreasonable search and seizure. With that decision in the year 1928, the two classes of cases, i.e., evidence obtained by unconstitutional search and seizure, and that gained by wiretapping, separated and began to wind their divergent ways towards this day and this case.

The next case was *Wolf* v. *Colorado*, 338 U. S. 25. There the Court held that the doctrine of *Weeks* v. *United States*, *supra*, was to be construed only as against federal officers, and laid down the principle that the exclusion of illegally seized evidence in a state court was not a part of the Fourth Amendment, but a policy of judicial administration over which federal courts should not exercise control despite the constitutional prohibition of *Weeks* and refused to invade the rights of each state to formulate its own rules of evidence and precluded the application of the Federal exclusionary rule to state courts.

Thereafter, *Stefanelli* v. *Minard*, 342 U. S. 117, held that the Federal Courts should not interfere collaterally in the trial in state courts of criminal cases. The Court stated in *dicta*, quoting from *Wolf* v. *Colorado*, *supra*, that such interference would be warranted if a state affirmatively authorized violation of the *Constitution*. The well established text set down by a long line of eminent jurists that the Fourteenth Amendment protects only fundamental rights from encroachment by the states should be adhered to. It is submitted that all these cases had to do with the question of *unlawful and unconstitutional* search and seizure, as defined in *Olmstead* v. *United States*, *supra*.

The extension of that time tested rule can only lead to havoc were it to now be extended to encompass not only constitutional guarantees, but also federal statutory provisions. To do so may well open the door to complete destruction of state sovereignty and state's rights. The mere passage of a federal statute, whether providently done, whether good or bad, could have the result of destroying the fundamental rights of the states, as well as each individual who makes up that state, and would leave the law of each state to the mercy of a particular Congress. This would go beyond anything envisioned by the framers of our Constitution and would have irreparably destructive results.

Then came *Schwartz* v. *Texas*, 344 U. S. 199. The petitioners suggest, Petition, page 13, that the ruling there abandoned the distinction made by *Olmstead* and was based upon *Wolf* v. *Colorado*, *supra*, exclusively. Plainly that is not so, since the dissenting opinion of Mr. Justice Douglas in *On Lee* v. *United States*, 343 U. S. 747, 762, upon which he based his dissenting opinion in *Schwartz* v. *Texas*, *supra*, page 205, says unmistakably that he would then have overruled the *Olmstead* case. It must therefore follow that the majority of the Court accepted *Olmstead* as the law. Thus, the physical intrusion test established by *Olmstead* was still the vital consideration, and *Nardone* v. *United States*, 302 U. S. 379, whereby in federal courts wiretap evidence was excluded must be regarded as having enunciated a rule of evidence on the theory that this Court has supervisory power over the Federal Court System in and for federal courts. This, then, was the sanction imposed upon federal officers for violation of federal law which Mr. Justice Murphy later thought so desirable in *Wolf* v. *Colorado*, *supra*.

The next case was *Benanti* v. *United States*, 355 U. S. 96. The holding there was unequivocally stated to be, page 100:

> "... the correct application of the above principle (wiretap evidence not be used to secure federal conviction) dictates that evidence obtained by means forbidden by Section 605, whether by state or federal agents, is inadmissible *in federal court*." (Parenthetical comment and emphasis added.)

This holding is entirely consistent with the rule of evidence theory of *Nardone*. It is not inconsistent with *Olmstead* and specifically the case did not overrule *Schwartz* v. *Texas*, *supra*.

Finally came *Mapp* v. *Ohio*, 367 U. S. 643, with which the Court is too familiar to require any further discussion.

Thus in resume it is seen that in *Weeks* in 1913 the exclusionary rule was invoked for the first time against *unconstitutional* searches and seizures by federal agents. In 1928, however, *Olmstead* came along and held that telephone interception was not a violation of the Constitution. Therefore, the subsequent decisions in *Wolf* v. *Colorado, supra; Stefanelli* v. *Minard, supra,* and *Mapp* v. *Ohio, supra,* because they all deal with unconstitutional searches and seizures, are inappropriate to the instant case.

The other line of cases which descends from *Weeks* and *Olmstead, Schwartz* v. *Texas, supra; Nardone* v. *United States, supra;* and *Benanti* v. *United States, supra,* were all concerned with wiretap evidence. However, in terms of *Olmstead* this was not a constitutional question, so these cases may only be said to have enunciated a rule of evidence, that wiretap evidence is inadmissible *in federal courts.*

In this view of the governing precedents, *Pugach* v. *Dollinger,* 365 U. S. 458, was inevitable. Because the application was made to the federal court to enjoin the use in a state court of wiretap evidence, *Stefanelli* v. *Minard, supra,* was clearly in point, and the majority of the Court so held. The same majority, with the exception of Mr. Justice Brennan, felt also that *Schwartz* v. *Texas, supra,* also controlled, and they so stated.

It is therefore submitted that there is no essential conflict among *Mapp, Pugach, Schwartz,* and *Wolf.* They are brought to their seemingly divergent conclusions by the fact that they deal with two different problems, one a constitutionally guaranteed right, the other the force and effect to be applied to a federal statute. So the United States Court of Appeals reasoned in *Williams* v. *Ball,* 2d Circuit, 294 F. 2d 94, and this Court denied certiorari in that case. —— U. S. ——, 7 L. Ed. 2d 526.

In the respondent's view as it has been attempted to be set forth, *supra*, there is no sound basis for the petitioners' insistence that *Mapp* v. *Ohio*, *supra*, overruled *Schwartz* v. *Texas*, *supra*, as well as *Wolf* v. *Colorado*, *supra*. They nevertheless urge that it be reconsidered, and they offer reasons why its holding is no longer tenable.

Section 605, in and of itself, has never provided for the exclusion of wiretap evidence. It is submitted that in view of the problems inherent in this subject matter both from the standpoint of the privacy of the individual and the rights of society to be protected from criminal elements who would be able to operate with impunity by using telephone communications, this is far more appropriately a problem for the Congress to face up to. But in *Olmstead* v. *United States*, *supra*, this Court stated, page 465:

> "Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence."

As noted, *Olmstead* was decided in 1928. When in 1934, Sec. 605 of the Federal Communications Law was passed, the conclusion seems inescapable that the Congress was attempting to protect the secrecy of telephone calls by statute because this Court had stated that at common law there was no such protection. However, despite the unmistakable expression of the law by the Court, *supra*, no "direct legislation" was incorporated into the law to make evidence obtained by its violation inadmissible. Furthermore, as this Court stated in *Nardone* v. *United States*, 302 U. S. 379, 381, the Congress had then resisted, as it still continues to resist, any attempt specifically to include law enforcement officers within the prohibition of Section 605 or to give statutory weight to the hypothesis that this evidence should be inadmissible.

It is submitted that *Schwartz* v. *Texas, supra,* has as much vitality now as it had in February, 1961, when it was specifically relied upon by six of the learned Justices of this Court in *Pugach* v. *Dollinger, supra.*

The respondent emphatically disagrees with each of the contentions put forth in the petitioners' Question 5. The essence of the *Olmstead* decision is to be found in the language of the Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated."

The *Olmstead* Court construed that language to connote a physical intrusion, a physical search, and a seizure of physical material. The respondent cannot conceive that there is no longer any difference between a physical, tangible, space-occupying object and a spoken word which hangs for a moment on the air and then disappears forever. It was that very distinction which the Court drew which separated mailed material on the one hand and the spoken word on the other. It said, page 464:

> "It is plainly within the words of the Amendment to say that the unlawful rifling by a government agent of a sealed letter is a search of the sender's papers or effects. The letter is a paper, an effect. . . ."

and as such, a thing of physical existence, it falls within the constitutional proscription.

Silverman v. *United States, supra,* rather than negating the *Olmstead* rule, reaffirms it. That case concerned a "spike mike", which involved a physical intrusion into the house or property of the defendant. This Court so held, not by distinguishing it from the *Olmstead* case, but by a determination that it fell precisely into the area which *Olmstead* had held to be violative of the Amendment.

Dealing then with the petitioners' claim that a telephone tap is a search for evidence, it is difficult to discover how that could be utilized in any manner to discredit *Olmstead's* authority, because, not to belabor the point, *Olmstead* deals with what is and what is not constitutionally prohibited. Surely the Constitution does not bar searches to discover evidence, for if it did, the right to search incidental to arrest would be seriously abridged. A fact not to be forgotten in the instant case is that the investigation and ultimately the several convictions were concerned with conspiracy. Therefore, regardless of what the authority for the wiretap orders was, the Westchester County Deputy Sheriffs were not listening to evidence alone; they were listening to a crime being committed. Furthermore, since this case and the *Mapp* case, the New York State Legislature has enacted legislation permitting a search for evidence. It is submitted that what this Court is being asked to do by the petitioners is to sweep away thirty odd years of well reasoned judicial precedent and to restore the law in this area to the *status quo* of the period prior to *Olmstead*, to redecide *Olmstead*, and to rechannel the law so as to bring it within the purview of *Mapp* v. *Ohio*, *supra*. They are asking this Court to preside at the shotgun marriage of constitutional rights and statutory law. It is respectfully submitted that the Court should decline to do so.

Because this case will be controlling law in the State of New York, if not in the United States, the respondent is compelled to call to the attention of the Court certain other considerations. It is said of wiretapping that it is "dirty business". But murder, and rape, and robbery and theft are also dirty businesses. And so is professional syndicated gambling. The technological developments which have emerged since the Second World War are quickly put to use by the criminal fraternity, and because these advances are so novel, legislation tends to fall behind them. The Court may be aware that in the county where

this appeal arose there was discovered in the spring of 1961 that an electronic device had been developed and put into use by the gambling element which would render a wiretap practically useless. The technical developments of the past twenty years have been extraordinary. If the prosecutive authorities have not been foreclosed from adopting equally sophisticated counter-measures, then their right to use them should be acknowledged.

It is submitted that mere listening to an intercepted telephone conversation is not a violation of section 605 of the Federal Communications Law, because the statute provides that there must also be divulgence of the overheard information. It is also submitted that Congress never intended to usurp the police powers of New York State when it passed the Federal Communications Law and that it was never the intention of the authors of the Constitution or of the Congress to permit the five percent which represents the criminally inclined population of this country to create a lawless anarchy which the remaining ninety-five percent are unable to control.

Question 2

(Which is in response to the questions enumerated by petitioners as #6 and 7).

It is submitted that some small background of this case is not inappropriate here. The petitioners were indicted in late 1956 and 1957. At that time they selected as their legal representation, Wolfgang E. Cribari, Esquire, of the law firm of Cribari, Scapolito and Solinger of Mount Vernon, New York. One of Mr. Cribari's first moves was to challenge the validity of the indictments on the ground that they had been secured on the basis of wiretap evidence. In this challenge he was successful, and the indictments were ordered to be dismissed. *People* v. *Dinan*, 15 Misc. 2d 211. The People appealed this order to the Supreme Court, Appellate Division, Second Judicial De-

partment, and were successful. The indictments were ordered to be reinstated (7 A. D. 2d 119). The petitioners then appealed the order of the Appellate Division to the New York Court of Appeals where the order reinstating the indictments was affirmed (6 N. Y. 2d 715). Thereafter, an application was made to this Court for a writ of certiorari which was denied, *Dinan* v. *New York*, 361 U. S. 839. This entire gamut of legal maneuvering consumed no less than two years, and throughout that period of time the petitioners were continuously represented by Mr. Cribari. Mr. Cribari was also counsel to these defendants when they went to trial and consumed two days in an unsuccessful endeavor to obtain a jury to try this case in the summer, and consented to have the case marked over to the fall term. On February 4, 1960, this case went to trial and Mr. Cribari represented five of the seven defendants, two having in the interim retained other counsel.

The jury was not fully selected and sworn until February 5, at 3:10 p.m. Thereafter the Assistant District Attorney opened to the jury and thereafter Mr. Cribari made several motions directed to that opening. Thereafter Deputy Sheriff Arthur L. Thela testified to the installation of several telephone interception devices and Deputy Sheriff Kurt Fennhahn testified to having monitored certain of such devices as did Deputy Sheriff Paul J. Black. Thela was examined on *voir dire* by Mr. Cribari. With regard to taped conversations so intercepted and monitored, Mr. Cribari made certain fairly broad stipulations on behalf of each of his defendants. On February 10, 1960, the fifth day of the trial, Mr. Cribari requested permission to withdraw from the defense of the petitioners Dinan and Bricker and to have substituted in his stead Joseph L. Delaney, Esq. The reason given for this proposed substitution of counsel was Mr. Cribari's apprehension that "there may very well be a conflict of interest between several of the defendants" whom he represented. The People opposed such a substitution on the grounds

that it might irretrievably prejudice their case and the request was denied. Mr. Delaney was permitted to sit at counsel table, however, with the proviso that he not actually engage in the trial of the case.

At page 19 of the Petition and in the footnote on page 21 it is suggested that one or more of these petitioners might have chosen to testify had they been represented by counsel other than Mr. Cribari. The fact however remains that none of these defendants elected to take the stand nor did they have any intention of so doing. This trial consisted mainly in the playing of tapes of the voices of these and other defendants, and the trial took two months. In his summation to the jury, Mr. Cribari conceded that the tapes had proved a criminal conspiracy; his only point was one of identity. He claimed that the defendants had no connection with it, and he excoriated the prosecution's witness whose testimony had consisted almost exclusively in identifying the voices on the tapes as those of the petitioners. In the New York Court of Appeals the same concession and the same argument was made. Yet it is now soberly suggested that one or more of the petitioners might have elected to testify. But within their first twenty words they would have established irretrievably their identities as the speakers on the tapes. It is submitted that this argument must be considered as a mere tactical gambit and in no sense is being put forward in good faith or as an example of prejudice.

To return, then, to the questions actually presented on this petition, it was contended by Mr. Cribari that "there may very well be a conflict of interest" (822), among the five defendants whom he represented. At no point did Mr. Cribari state that he had discovered any existing conflict of interest: he was merely speculating that one might possibly arise. It is undoubtedly true that no defense attorney should be compelled to point out where the conflict of interest may lie, *People* v. *Bopp*, 279 Ill. 184, 116

N. E. 679; but he should be compelled to give the Court his assurance that one in fact exists. Mr. Cribari did not do so. In fact his language can only be construed as indicating that *if* there was such a conflict, he was unaware of it, because his expression, "may very well be" is a total negation of his knowledge of current, pointed information.

To cut to the heart of this question, and to avoid the necessity of answering each and every case cited by the petitioners, the respondent freely concedes that when a man's life or liberty is in jeopardy it is unquestionably his right to select his own attorney. The question is when does good order dictate that this privilege end? At what point does his choice become binding upon him? Obviously there must be such a point, just as there comes a point when his choice of a surgeon becomes irrevocable. It is submitted that the option to retain new counsel ends when a trial or hearing of the issue commences. No case which the petitioners cite contravenes this thesis. Every case they cite insists that a defendant may select his own counsel *until a trial of the merits of the case begins.* After that the right becomes a qualified one which then falls within the discretion of the court. *United States ex rel. Hyde* v. *McMann*, 263 F. 2d 943. This is not a new question to the Court. The *Hyde* case was denied certiorari, 360 U. S. 937, as were *United States* v. *Mitchell*, 138 F. 2d 831, 321 U. S. 794; and *United States* v. *Paccione*, 224 F. 2d 801, 350 U. S. 896. Specifically to deal with *Mitchell* the Court of Appeals held that in the absence of a statement by the defendant that he chose thereafter to represent himself it required the conclusion that he wanted to be represented by another attorney, and on this state of facts the Court concluded that the refusal of the trial court to grant the request was not an abuse of discretion.

Not to be overlooked in the instant case, either, is the fact that Mr. Cribari was selected by the petitioners. In

no manner of speaking can it be claimed that he was foisted upon them. He represented them for almost four years in this matter, and it is submitted that it is incredible that he became aware of the lurking possibility of a conflict of interest for the first time after the commencement of the trial approximately four years after his first acquaintance with the case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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